ULTRATECH SDN. BHD.

v.

NURUDDIN @ ZAINUDDIN BIN TAUHID & 2 ORS.

HIGH COURT MALAYA, TAIPING
TUAN ZULKEFLI BIN AHMAD MAKINUDIN JC
[CIVIL SUIT NO. 22-54-94(T)]
27 JANUARY 1995

***COMPANY LAW**: Authority of company to appoint solicitors to act on its behalf - Constitution of company directors and shareholders - Forms 14 and Forms 49 - Sections 54(1) & 162 Companies Act 1965.*

***PRACTICE & PROCEDURE**: Order 12 r. 7(1) & 7(2) RHC 1980 - Authority of company to appoint solicitors to act - Other proceedings to be stayed till issue determined.*

***PRACTICE & PROCEDURE**: Order 18 r. 19 RHC 1980 - Striking out of writ and statement of claim - Whether trial of disputed issues necessary.*

***PRACTICE & PROCEDURE**: Order 29 r. 2B RHC 1980 - Contempt of Court - Leave to issue committal proceedings - Whether contemnors to purge contempt before being given right to defend proceedings - Whether application for committal proceedings to be filed before lapse of ex parte interim injunction.*

***PRACTICE & PROCEDURE**: Interlocutory injunction - Anton Piller orders - Defendants acting on behalf of plaintiff - Ineffective undertaking of damages by plaintiff company - Whether status quo should be maintained - Balance of convenience - Whether the pre-conditions for Anton Piller order complied with.*

The plaintiff sued the defendants who were the directors and shareholders of the plaintiff for, *inter alia*, Anton Piller orders, an injunction restraining the defendants from harasssing or otherwise interfering with the plaintiff's logging operations at Dalam Air Tasik Temenggor, Ulu Perak and for rectification of Forms 24 and 49 lodged by the defendants with the Registrar of Companies on 10 October 1994. The defendants argued that their Form 49 dated 10 October 1994 reflected the true directorship and that prior to 30 August 1994 other Forms 49 and 24 had been lodged by the respective parties. The defendants also argued that the plaintiff had not complied with the memorandum and articles of the company in holding the directors' meeting. The plaintiff argued that if the defendants were aggrieved by the composition of the directorship reflected in the Form 49 filed by the plaintiff on 30 August 1994, the defendants should have applied for rectification of the register instead of filing another Form 49.

An *ex parte* interim injunction was granted to the plaintiff to be heard inter partes on 3 December 1994. The defendants entered conditional appearance and replied to the plaintiff's affidavit. Subsequently, the plaintiff filed an application for leave to issue committal proceedings against the 1st and 3rd defendants for non-compliance of the order (*ex parte*) of the interim injunction. Meanwhile, the defendants applied to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980 (RHC 1980).

At the hearing of the inter partes hearing for the interim injunction, the defendants raised a preliminary issue that the plaintiff's solicitors were not duly authorised to act for the plaintiff. The plaintiff argued that the plaintiff's application for leave to issue committal proceedings should be heard first as the defendants could not proceed until they had purged their

contempt.

On the issue of the interim injunction, the plaintiff submitted that if the plaintiff could show a serious question to be tried, that the balance of convenience was in favour of the plaintiff and damages were not an adequate remedy, the injunction should continue. The plaintiff also submitted that it was contractually bound to 3rd parties to extract logs and preventing that would expose the plaintiff to multiple suits for money. Furthermore, the Court had power under para. 6 to the Schedule to s.25(2) of the Courts of Judicature Act 1964 to provide for interim preservation of property.

The defendants argued that they were defending the action on the premise that they were still the directors and shareholders of the plaintiff and whatever action taken was done for and in the name of the plaintiff and that the plaintiff had no authority to sue the defendants who should have the control of the plaintiff. The defendant also argued that the issue of 3rd party suits against the plaintiff was not relevant as the 3rd party contractors were at liberty to sue as their rights were not affected by virtue of s.20(2) of the Companies Act 1965. The defendants claimed that the undertaking of damages given by the plaintiff would be ineffective as it was not given by the directors in their personal capacity and that ultimately, the plaintiff's shareholders including the 1st and 2nd defendants would be directly affected. The defendants further argued that as the injunction was in the form of an Anton Piller order which was mandatory in nature, it could only be granted in rare and exceptional circumstances which did not exist in the present case and the effect of the injunction would be to exclude the defendants from the business set up by them. Furthermore, the Court should consider the plaintiff's conduct in view of s. 54(j) of the Specific Relief Act 1950 as the plaintiff had not made full and frank disclosure of material facts in its application in that the plaintiff's director had failed to declare his interest in other companies and had made sweeping assertions about the defendants' interest in the plaintiff.

Held:

[1] The burden of proving due authority of solicitors rests on the plaintiff. On a balance of probability, the plaintiff had proved they had the authority to appoint solicitors to act against the 3 defendants. The composition of the board of directors as reflected in Form 49 filed on 30 August 1994 and the extract of the minutes of the director's meeting were sufficient to prove due appointment of the solicitors.

[2] With regard to the 1st and 3rd defendants' application to strike out the plaintiff's claim, the disputed issues such as the propriety of the various Forms 24, 49 and the due compliance of the articles and memorandum of association of the plaintiff are matters which should not be decided at this stage but should be decided at the trial proper.

[3] The applicaiton for leave to issue committal proceedings was not filed before the inter partes hearing for the interim injunction, but was filed after the inter partes hearing had commenced and parties had agreed that the inter partes hearing would continue in the event the 1st and 3rd defendants' application to strike out the claim is dismissed. Further, in view of O.29 r.2B of the RHC 1980, the issue of contempt proceedings does not arise as the application for leave to commit was made after the expiry of two weeks when the ex parte interim injunction had already lapsed.

[4] The plaintiff has shown there is a serious question to be tried and that it would not be adequately compensated in damages by the defendant if a permanent injunction is granted. However, the undertaking as to damages by the plaintiff may not be fulfilled if the defendants succeed as the damages will come from the funds of the plaintiff in which the defendants are the shareholders.

[5] Since neither party has applied to the Court under s.162 for rectification of the register so as to reflect the true directorship of the plaintiff company, the issue of which group of directors actually have the control and management of the plaintiff can only be decided after a trial. The balance of convenience is therefore in favour of maintaining the status quo.

[6] If the interlocutory injunction is granted the 1st and 2nd defendants would be totally excluded from the management and operation of the plaintiff company which they had co-founded. It would also put a complete stop to the logging activities which had been carried on by the defendants in the name of the plaintiff. The mere lodging of Form 49 dated 30 August 1994 by the plaintiff in the light of the presence of other Forms 49 lodged earlier and later with the Registrar of Companies is insufficient to dislodge the defendants from claiming to be still the serving directors of the plaintiff.

[7] The plaintiff had not complied with the basic pre-conditions for the making of an Anton Piller order i.e. the plaintiff had not precisely set out the terms of the injunction and the orders sought for were all couched in a general and loose manner as they did not specify precisely as possible the premises, the documents, materials and articles to be inspected and removed.

[Defendants' preliminary objection dismissed, 1st & 3rd defendants' application to strike out plaintiff's claim dismissed, plaintiff's application for leave to issue committal proceedings dismissed, plaintiff's application for an injunction dismissed with costs and order of interim injunction set aside with damages to be assessed].

Cases referred to:
William Jack & Co. (M) Sdn. Bhd. v. Chemquip Sdn. Bhd. & Anor. [1991] 2 MLJ 555 ***(refd)***
Cyanamid Co. v. Ethicon Ltd [1975] 2 All ER 504 ***(refd)***
Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok [1975] 2 MLJ 109 ***(refd)***
CBS United Kingdom v. Lambert [1982] 3 All ER 337 ***(refd)***
Garden Cottage Foods v. Milk Marketing Board [1983] 2 All ER 770 ***(refd)***
Films Rover International Ltd. & Ors. v. Cannon Film Sales Ltd. [1986] 3 All ER 772 ***(refd)***
Salcon Engineering Sdn. Bhd. v. PGM Energy Systems (M) Sdn. Bhd. [1994] 1 CLJ 295 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 12 r.7(1)(2)
The Companies Act 1965, s. 20(2) 54(1) 141(6), 162
The Specific Relief Act 1950, s. 54(j)
Courts of Judicature Act, 1964, s. 25(2)

For the plaintiff - V. Vijaya Segaran (Paul P Subramaniam with him); M/s. Maxwell, Kenion, Cowdy and Jones
For the first and third defendants - K.H. Lua; M/s. Lua & Mansor
For the second defendant - Ahmad Faaiz b. Hj. Ahmad Mahir; M/s. Wee Choo Keong & Faaiz

JUDGMENT

Zulkefli bin Ahmad Makinudin JC:

The plaintiff filed writ of summons (Encl. 1D) against the first, second and third defendants on 10 November 1994 and in the statement of claim sought various claims and orders against the defendants. At the same time the plaintiff by summons-in-chambers (Encl. 1B) dated 10 November 1994 on a certificate of urgency applied for and obtained *ex-parte*, an interim injunction in the form of an Anton Piller order against the first, second and third defendants on 11 November 1994. I made the summons returnable on 24 November 1994.

The first and the third defendants meanwhile entered a conditional appearance on 19 November 1994 against the writ of summons of the plaintiff filed on 10 November 1994. The first defendant also filed on 22 November 1994 an affidavit in reply (Encl. 7) to the supporting affidavit of the plaintiff's *ex-parte* summons-in-chambers dated 10 November 1994.

At the *inter-partes* hearing on 24 November 1994, Counsel for the second defendant informed the Court that he was not ready to proceed with the case as the second defendant had not been served with the writ of summons and other papers by the plaintiff. I then directed that the hearing of the *inter-partes* on the order of the interim injunction be heard in open Court on 3 December 1994 and for the necessary papers to be served on all parties concerned.

The second defendant then entered a conditional appearance on 1 December 1994 against the writ of summons of the plaintiff dated 10 November 1994. The second defendant also filed an affidavit in reply (Encl. 8) to the supporting affidavit of the plaintiff's summons-in-chambers dated 10 November 1994.

In the intervening period on 2 December 1994 the plaintiff filed an *ex-parte* summons-in-chambers (Encl. 12) for leave to issue an order of committal against the first and third defendants for non-compliance of the order of the interim injunction dated 11 November 1994. The first and third defendants on the other hand filed a summons-in-chambers (Encl. 11) on 3 December 1994 for an order that the plaintiff writ and statement of claim against the first, second and third defendants be struck out under O. 18 r. 19 of the Rules of the High Court 1980. Both the plaintiff's *ex-parte* summons-in-chambers and the first and third defendants summons-in-chamber were fixed for hearing on 9 December 1994 by the Senior Assistant Registrar.

At the hearing on 3 December 1994 Counsel for the first and third defendants questioned the authority of the solicitors for the plaintiff to act in the proceeding. Counsel for the second defendant adopted the same course of action on this point against the plaintiff. The Counsel for the first and third defendants submitted that once the challenge of authority has been made, the burden of proving that the suit had been instituted with proper authority rested on the plaintiff company. It was further submitted that if the Court was satisfied that the plaintiff company had not acted within its powers, the Court could and should exercise jurisdiction.

The Counsel for the first and third defendants also submitted that it was open to the defendants under O. 12 r. 7(1) of the Rules of the High Court 1980 to question the authority of the plaintiff company. The first, second and third defendants in their respective affidavits filed were all contesting the suit of the plaintiff on the premise that they are currently still the directors and the shareholders of the plaintiff company. It was contended that the issue of whether the action will lie at all should if possible be decided as a preliminary issue, and not left for determination at the trial.

Encik Segaran, Counsel for the plaintiff submitted that in view of the challenge of authority for the solicitors to act for the plaintiff by all the defendants the proceeding of the *inter-partes* on the order of the interim injunction should be stayed and the matter should be heard by way of summons in chambers as provided for under O. 12 r. 7(2) of the Rules of the High Court, 1980. It was also submitted for the plaintiff the fact that the first and third defendants had filed summons-in-chambers to strike out the plaintiff's writ and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 which was fixed for hearing on the 9 December 1994, it was right and proper for the proceeding to be stayed as the issue of the absence authority of the solicitors to act for the plaintiff would be among the grounds raised by the defendants at the said hearing.

Having heard the submission of Counsels for the plaintiff and for the first and third defendants on this issue of challenge of authority of the solicitors of the plaintiff to act, I ruled that the proceeding of the *inter-partes* on the order of the interim injunction be stayed and directed the summons-in-chambers of the first and third defendants filed on 3 December 1994 and their supporting affidavit be served on the plaintiff and the hearing of the matter be heard on 9 December 1994. In arriving at this decision I found that the issue of challenge of authority of the solicitors of the plaintiff to act was only made at this stage of the proceeding by the Counsel for the first and third defendants. To be fair to the plaintiff who was only served with the first and third defendants' summons-in-chambers on 3 December 1994, I am of the view that the plaintiff should be given the opportunity to reply and rebut by way of affidavit the allegation now made by the first and third defendants. It is my finding at this stage of the proceeding where the challenge of the authority of solicitors of the plaintiff to act was made there was no sufficient or admitted evidence that there is no action properly before the Court. In the circumstances it is only proper that the Court should stay the proceeding and determine the issue of want of authority on an application of a party by motion or summons. This was the view taken by the Supreme Court in the case of *William Jack & Co. (M) Sdn. Bhd. v. Chemquip Sdn. Bhd. & Anor.* [1991] 2 MLJ 555 where at p. 558 it states:

> Although the various *dicta* in the authorities as to the methods open to a defendant to contest the authority to bring an action are not altogether easy to reconcile or understand, we would agree that a challenge to the authority of solicitors may be made at any time and the Court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck off if there was sufficient or admitted evidence that there is no action properly before it. But when there is no such evidence the Court should only stay the proceeding and determine the issue of want of authority on the application of a party by motion or summons.

When the case came up for hearing of the first and third defendants' summons-in-chambers (Encl. 11) to strike out the plaintiff's writ under O. 18 r. 19 of the Rules of High Court 1980 on 9 December 1994, the Counsel for the first and third defendants submitted that the burden of proof that the solicitors for the plaintiff have the authority to act lies on the plaintiff which I do agree and henceforth directed the Counsel for the plaintiff to begin first with his submission. The plaintiff in proving its case submitted that the plaintiff company and acted within authority against the first, second and third defendants and urged the Court to refer to the affidavit of one of its director Mohd. Ghazalee bin Yaacob filed on 8 December 1994. Exhibit "MGY1" annexed to the affidavit of Mohd. Ghazalee (Encl. 25) showed that Form 49, which is a statutory form issued under s. 141(6) of the Companies Act 1965 and filed with the Registrar of Companies on 30 August 1994 had confirmed the appointment of Mohd. Ghazalee and three others as directors of the plaintiff. There were also three other Directors whose appointment remained unchanged in the said Form 49, one of whom is the third defendants. In regard to the issue of authority of solicitors, M/s. Maxwell, Kenion, Cowdy and Jones to act on behalf of the plaintiff company, Mohd. Ghazalee averred that the said solicitors were duly authorised to act on behalf of the plaintiff following a board resolution of the directors of the plaintiff on 2 September 1994 presided by one Abdul Malik @ Saidi bin Mohd. Alwi, a Director of the company. Exhibit "MGY2", annexed to the affidavit of Mohd. Ghazalee was shown to be the true copy of the extract of the minutes of the directors meeting dated 2 September 1994.

The plaintiff also relied on the affidavit of Tan Sri Abu Zarim bin Omar, (Encl. 24) a director of the plaintiff company filed on 8 December 1994 who averred that the Form 49 dated 30 August 1994 as in Exhibit "MGY1" reflected the true constitution of the plaintiff company's

directorship. Tan Sri Abu Zarim also averred that Mohd. Ghazalee bin Yaacob was appointed as director of the plaintiff on 30 August 1994.

As regards Form 49 dated 10 October 1994 filed by the defendants which the defendants alleged reflected the true constitution of the company directorship and which excluded Mohd. Ghazalee bin Yaakub and all other directors as reflected in Form 49 dated 30 August 1994, the Counsel for the plaintiff submitted that the Court should ignore it because the defendants had done so without regard to the earlier Form 49 filed by the plaintiff. It was further submitted for the plaintiff that the defendants instead of filing the Form 49 dated 10 October 1994 should have taken action under s. 162 of the Companies Act 1965 to apply to the Court to rectify the register if they were aggrieved by the composition of the directorship of the plaintiff company as reflected on Form 49 filed by the plaintiff on 30 August 1994.

The Counsel for the first and third defendants and Counsel for the second defendant submitted at great length that the plaintiff company as represented by the directorship as reflected in Form 49 dated 30 August 1994 did not have the authority to appoint the solicitors to act for the plaintiff. It was submitted for the defendants that prior to the lodging of Forms 49 dated 30 August 1994 there were other Form 49 lodged at any one time by the respective parties concerned in which the composition of the directorship is reflected. Besides, Form 49 being lodged with the Registrar of Companies it was submitted for the defendants there were also a number of Form 24, a statutory Form issued under s. 54(1) of the Companies Act 1965 which *inter alia* reflected the composition of the shareholders of the plaintiff company and the allotment of shares being lodged either by the officers representing the plaintiff company or the defendants at any one time.

The defendants submitted that the contention of the plaintiff that the defendants should have taken the action under s. 162 of the Companies Act 1965 to apply to the Court to rectify the register if the defendants were aggrieved by the composition of the directorship as reflected in Form 49 filed by the plaintiff on 30 August 1994 was untenable in the circumstances of the case. It was submitted for the defendant that equally the same course of action could have been taken by the plaintiff in rectifying the register as regards Form 49 lodged by the defendants on 10 October 1994 which in this case the plaintiff did not do so. Furthermore it was the contention of the defendants that since neither party had taken the step to rectify the register as regards the status of Form 49 at any given time the latest Form 49 dated 10 October 1994 lodged by the defendants should be accepted as rightly reflecting the composition of the directorship of the plaintiff company.

The defendants also questioned the authenticity of Exhibit "MGY2" a copy of the extract of the minutes of the directors meeting dated 2 September 1994 through which the plaintiff company claimed to have authorised the appointment of the solicitors to act for the plaintiff against the defendants. Counsel for the first and third defendants submitted that Exhibit "MGY2" produced by the plaintiff was not indicative of the fact that the meeting of the board of directors of the plaintiff company had actually taken place on 2 September 1994. The defendants contended that the plaintiff should have produced as evidence the full minute of the said alleged meeting where the attendance of the directors could have been shown and noted. In this regard it was submitted that the third defendants who by virtue of the Form 49 dated 30 August 1994 was still a serving director of the plaintiff company should have been invited to attend the meeting. In this case the third defendants in his affidavit (Encl. 27) filed averred that he was not called for the meeting and that he believed there was no such meeting authorising the appointment of the solicitors to act for the plaintiff against the defendants. For the defendants it was also submitted that the Court should also give

due consideration as to whether the plaintiff company in the conduct of its affairs had complied with the provision of the article and memorandum of association of the company. In this case the defendants contended that in ousting their rights of either being directors and shareholder of the plaintiff company, it appeared that the plaintiff company had not shown it had complied with the article and memorandum of association of the company.

Having heard the submission of Counsel for the plaintiff and Counsels for the first, second and third defendants and having studied the affidavits filed by all the parties I am satisfied on the balance of probability that the plaintiff company had proved that they had the authority to appoint the firm of solicitors to act for them against all the three defendants. In arriving at this decision I found Exhibit "MGY1" in the affidavit of Mohd. Ghazalee bin Yaakub dated 8 December 1994 as reflected in Form 49 showing the composition of the board of directors of the plaintiff company as from 30 August 1994 and Exhibit "MGY2", a copy of the extract of the minutes of the directors meeting dated 2 September 1994 sufficient to prove that the solicitors for the plaintiff had been appointed and authorised to act on behalf of the plaintiff. I am also of the view that disputed issues such the propriety of the various Forms 49, Forms 24 and as to whether the provisions of the article and memorandum of association of the company had been duly complied with are matters which I should not decide at this stage but at the trial proper of the suit. In the circumstances I dismissed with costs the application of the summons-in-chambers (Encl. 11) of the first and third defendants dated 3 December 1994. I also make an order that the proceeding of the hearing *inter-partes* on the order of the interim injunction that had been stayed before this be continued.

At the outset of the resumption of the hearing of the *inter-partes* proceeding on the order of the interim injunction Counsel for the plaintiff submitted that the Court should consider first the plaintiff's *exparte* summons-in-chambers dated 2 December 1994 (Encl. 12) for leave to issue committal proceeding against the first and third defendants for breach of the order of the interim injunction dated November 1994. The plaintiff's Counsel contended that the provision of the law is that the defendants cannot proceed with their action until they purge their contempt. With respect to the contention of Counsel for the plaintiff I could not agree with him on the point raised in the context of this case. I am of the view that the issue of the defendants having to purge their contempt first before given the rights to contest the suit does not arise at all at this stage of the proceedings. The leave for committal proceeding was not filed at any time before the date fixed for the hearing of the *inter-partes* on the order of the interim injunction on 24 November 1994. It was filed after the *inter-partes* proceeding had commenced and that all the parties had agreed when the Court stayed the *inter-partes* proceeding to hear on the issue of challenge of authority of the plaintiff solicitors to act that in the event of the first and third defendants' summons-in-chamber to strike out the plaintiff's writ and statement of claim is dismissed, the hearing of the proceeding of the *inter-partes* on the order of the interim injunction should proceed to continue. Furthermore it is my view that based on the provision of O. 29 r. 2B Rules of High Court 1980 which states that unless sooner revoked or set aside, an interim injunction obtained on an *exparte* application shall lapse automatically at the end of two weeks from the date on which it is granted, it is clear therefore that the issue of contempt proceeding taken by the plaintiff against the defendant does not arise at all as the application for leave to issue committal proceeding was made after the expiry of the said two weeks period.

Having heard and disposed off the preliminary issues raised by both the plaintiff and defendant I now have to come back to deal with the main issue before me as to whether the interlocutory injunction given on 11 November 1994 should continue until trial or be set aside.

Essentially the interlocutory injunction in the form of Anton Piller orders sought for by the plaintiff includes the following:

(1) The order to permit the plaintiff's authorised representative to carry out search, inspection, copying, photographing and removing of the documents, goods and articles at the premise under the control and charge of the defendants.

(2) The order for the defendants and each of them to disclose to the authorised representative of the plaintiff the identity of all premises and their addresses in which any of the documents, goods or articles are or had been stored.

(3) The order for the defendants and each of them to deliver to the custody or control of the plaintiff's duly authorised representative all documents, goods or articles whose whereabouts they are required to disclose and within 24 hours they do swear and file herein an affidavit stating that all the documents, goods and articles required to be disclosed under this order have been disclosed and if not their whereabouts or what happens to them.

(4) The order that the defendants and each of them do forthwith upon service of the order on them or each of them or their agents or representative vacate the premises to the plaintiffs' duly authorised representatives, in particular, the land given to the plaintiff by the State Authority for the purpose of extraction and removal of timber known as Dalam Air Tasik Temenggor Daerah Hulu Perak (Kawasan Selatan Jambatan Banding).

(5) The order that the Registrar of Companies do forthwith remove and or delete from the records of the plaintiff with the said Registrar the Forms 24 and 49 caused by the defendants to be lodged on or about 10 October 1994 with the said Registrar in Penang and the Registrar do make such other rectification as necessary to give effect to such deletion and removal.

(6) The order that the defendants and each of them and their servants, agents or otherwise, be restrained from harassing, intimidating or otherwise interfering with the operations, property, machinery, servants and officers of the plaintiff in any manner whatsoever in particular at the area known as Dalam Air Tasik Temenggor Daerah Hulu Perak (kawasan Selatan Jambatan Banding).

Counsel for the plaintiff submitted that if the plaintiff can show there is a serious question to be tried, that on balance of convenience it is in favour of the plaintiff and damages would not be an adequate remedy the injunction should be allowed to continue until the trial of the suit and in this regard the plaintiff contended that it has satisfied all the said requirements. The plaintiff further submitted that from the affidavit of one of its directors, Mohd. Ghazalee bin Yaakub (Encl. 25) the plaintiff company has entered into contracts with third parties who are contractors for the purpose of extracting the timber at the said concession area and the licence given to extract the timber is valid until 21 September 1995 which meant that the plaintiff company has only about 9 months more to carry out its logging operations. It was submitted that the mere fact that there is a dispute should not prevent the plaintiff company from realising its investment. The plaintiff company must be allowed to honour the agreement with the contractors and for the company to extract and sell the logs. The plaintiff contended that preventing the company from doing so would have the effect of exposing the plaintiff company to multiple suits for large sums of money. The plaintiff also submitted that the Court has the power to invoke its additional powers under para. 6 of the schedule to s. 25(2) of the Courts of Judicature Act, 1964 (Act 91) to provide for the interim preservation of property the subject matter of any cause or matter by injunction or in any other manner

whatsoever and in the circumstances of this case urged the Court to exercise its power to allow the continuation of the interlocutory injunction until the trial of the suit.

Encik Lua, Counsel for the first and third defendants submitted that it is necessary at the outset for the Court to take cognizance of the fact that all the three defendants are defending the action on the premise that they are still the directors and the shareholders of the plaintiff company. Whatever action taken by the defendant prior to this action instituted by the plaintiff were all done for and in the name of the plaintiff company. The first and second defendant also claimed each of them held one-third shares each of the total shareholding of the plaintiff company. The first defendant in particular alleged that he had all the while also acted as the general manager of the plaintiff company from the time the company was given the licence from the Forest Department on 6 April 1993 until the present dispute between the parties evolved. The first defendant produced Exhibit "ZT2" annexed to his affidavit (Encl. 7) dated 21 November 1994 to show that the board of directors of the plaintiff company had appointed him as the general manager and given him the authority to deal with the Forest Department in respect of the licence issued by the Department.

Counsel for the first and third defendants again submitted that the plaintiff has no authority to take action against all the defendants and that in actual fact it is the defendants who are still directors and shareholders who should have the control and management of the plaintiff. Since this argument was dealt with quite at length by both Counsels for the plaintiff and the defendants during the stage of the challenge of the authority for the plaintiff solicitors to act against the defendant in the summons-in-chambers of the first and third defendants to strike out the plaintiff's writ and statement of claim, I directed the Counsels for the plaintiff and the defendant not to submit again as to do so would be a mere repetition. However the arguments raised for the defendants and plaintiff on this issue of whether the defendants are still directors and shareholders of the plaintiff company shall be duly considered by the Court in deciding whether the interlocutory injunction is to continue or not.

Counsel for the first and third defendants submitted that the plaintiff's contention of possible suits taken by third party contractors against the plaintiff for failure to honour the contract to supply the logs as a result of the action of the defendants, is not relevant at all for the purpose of determining the actual issue before the Court. In this case it was submitted for the defendant that they are challenging the action of the plaintiff company on the basis that they are still directors and shareholders of the plaintiff company. As to the question of the third party contractors taking action against the plaintiff for failure to honour the contract entered into, the defendants further submitted that the contractors are at liberty to do so as their rights are not affected by virtue of the provision of s. 20(2) of the Companies Act which states:

> No act or purported act of a company (including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether expressed or implied of the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance on transfer.

The Counsel for the first and third defendants submitted that on the issue of undertaking of damages given by the plaintiff for the interlocutory injunction to continue it would be of no effect to the defendants because the undertaking is not given in a personal capacity by the directors of the plaintiff company instituting the suit against the defendants but in the name of the plaintiff company, Ultratech Sdn. Bhd. If the defendants are the successful party at

the conclusion of the trial, the defendants in fact will take control and management of the plaintiff company. The present directors of the plaintiff company instituting the suit against the defendants are not the party who will pay damages to the defendant. If at all it is the shareholders of the plaintiff company who will be directly affected by the order of payment of damages to the defendant and incidentally in this case the first and second defendants are also the shareholders of the plaintiff company. In the circumstances the defendants submitted that there is no real and proper undertaking of damages given by the plaintiff company instituting the suit against the defendants.

The Counsel for the first and third defendants also urged the Court to consider the propriety and the justification of the orders sought for against the defendants under the interlocutory injunction. Counsel submitted that since the injunction is in the form of an Anton Pillar order which is mandatory in nature the Court can only grant such an order in rare and exceptional circumstances. It was submitted for the defendants there was no exceptional circumstances in this case. The orders sought for are not specific in nature and the document and items sought to be produced are not shown to be exclusively in the possession of the defendants. In fact the defendants alleged that some of the documents and items are also in possession of the present directors of the plaintiff company.

Encik Faiz, Counsel for the second defendant adopted the submission made for the first and third defendants wherever relevant and applicable to the second defendant. In addition it was submitted for the second defendant that the Court in exercising its discretionary powers to grant the injunction has to consider whether it is fair and just in the circumstances of the case to do so. It was submitted that the sum effect of the orders sought for by the plaintiff is to completely exclude the defendants from participating in the business of the plaintiff company which the defendants had set up in the first place. The second defendant in this respect having felt threatened by the action of the plaintiff had already earlier on 6 October 1994 filed the originating summons No. 24-199-94 at the High Court in Kota Bahru for a declaration of his existing and continuing rights as a director and shareholder of the plaintiff company and this case had been fixed for hearing on 17 January 1995 (see Exhibit "OCS1" in Encl. 8).

Counsel for the second defendant further submitted that there has not been a full and frank disclosure of material facts by the plaintiff company in applying for the interlocutory injunction. It was submitted that Mohd. Ghazalee bin Yaakub the director of the plaintiff company who affirmed the affidavit in support of the application for the interlocutory injunction did not disclose the fact that he was also a managing director of G.M. Enterprise Sdn. Bhd., a company which had entered into contract with the plaintiff company. In the circumstances it was the submission of the second defendant that there was a conflict of interests in Mohd. Ghazalee Bin Yaakub which was not explained to the Court. Mohd. Ghazalee Bin Yaakub in his affidavit in support of the application also stated that because of the action by the defendants the plaintiff company was not able to extract the timber from the said concession area and hence failed to fulfil its contractual obligation to supply timber to third party contractors. For the defendant it was submitted that in actual fact the situation was not true. The defendants in their affidavit filed had stated that there were record of sales of timber made by the plaintiff company as managed by its present directors in the month of October 1994 to third party contractors and this fact was not challenged by the plaintiff company.

Counsel for the second defendant submitted the Court should also consider the conduct of the plaintiff company and its officers in applying for the interlocutory injunction. In this regard Counsel cited the provision of s. 54(j) of the Specific Relief Act 1950 (Act 137) which states

that an injunction cannot be granted when the conduct of the applicant or its agents has been such as to disentitle him the assistance of the Court. In this case it was submitted that the conduct of Mohd. Ghazalee Bin Yaakub one of the directors of the plaintiff company in failing to declare his interests in other companies having business dealing with the plaintiff company and his sweeping assertion in his affidavit that the second defendant has no interests whatsoever in the plaintiff company, is sufficient for the Court to invoke the provision of s. 54(j) of the said Specific Relief Act 1950 not to grant the interlocutory injunction to the plaintiff.

In arriving at the decision of this case whether to allow or to refuse the continuation of the injunction until trial I am guided by the principles laid down in the case of *American Cyanamid Co. v. Ethicon Ltd.* [1975] 2 All ER 504. I am of the view that the granting of an interlocutory injunction is subject to equitable considerations. I am also reminded of the principle that if an application for an interlocutory injunction is in the form of Anton Piller order which is mandatory in nature the Court shall not grant the injunction before trial save in exceptional and extremely rare cases (See the case of *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 MLJ 109). The Anton Piller order is a very harsh remedy which has been likened to a search warrant. In this regard the affidavit in support of an application for an interlocutory injunction must state facts to enable the Court to conclude that the basic pre-conditions for making an Anton Piller order exists. The application should set out precisely the terms of the injunction. The order should identify the precise premises and should also specify as precisely as possible the documents, materials and articles that may be removed from the premises (see the case of *CBS United Kingdom v. Lambert* [1982] 3 All ER 337).

In this case I find that the plaintiff has shown that there is a serious question to be tried. I also find that the plaintiff has shown that if they are successful in establishing their rights to a permanent injunction at the trial the plaintiff will not be adequately compensated in damages by the defendants for their losses. However on this matter it is also necessary for me to consider if the defendants are successful in their case at the conclusion of the trial whether the plaintiff is in position to pay adequate damages to the defendants for their losses. In this regard it appears to me there is a doubt as to whether the undertaking as to damages made by the plaintiff can be fulfilled. This is so because the defendants in challenging the suit of the plaintiff are all defending their rights in their capacity as directors and shareholders of the plaintiff company. In the circumstances it is my view that the question of the plaintiff paying damages to the defendant does not arise if the defendants are the successful party at the conclusion of the trial because at that point of time the defendants will have the control and management of the plaintiff company and the damages to be compensated would have to come from the funds of the plaintiff company in which the defendants as shareholders had in the first place invested. The situation would be different if the undertaking to damages is made in a personal capacity by the present directors of the plaintiff company instituting the suit against the defendants.

Since I have found that the plaintiff in this case will not be adequately compensated in damages for their losses by the defendants if they succeed in establishing their rights at the trial and at the same time I have doubts as to whether the defendants will be adequately compensated in damages if they succeed in establishing their rights at the trial, I find it necessary to go on to the next test as laid down in the *American Cynamid* case in determining where the balance of convenience lies. The balance of convenience in my view is the balance of the risk of doing an injustice to any one party who can show they have an interest in a matter and are determined to defend and establish their rights.

In determining where the balance of convenience lies, all relevant factors should be considered

and the appropriate weight given to each factor. In this case I found as a fact there are many Forms 49 lodged at any one time with the Registrar of Companies to reflect the directorship of the plaintiff company. Both the plaintiff instituting the suit against the defendants in this case and the defendants claiming respectively that the Form 49 lodged by each of them reflects the true directorship of the plaintiff company. It is my view that since neither party has taken action under s. 162 of the Companies Act 1965 (Act 125) to apply to the Court to rectify the register so as to reflect the true directorship of the plaintiff company, I am not in a position at this stage to decide which of the two group of directors have the control and management of the plaintiff company. This issue of which party actually have the control and management of the plaintiff company can only be decided at the trial proper of the suit in which both the parties will have to prove their case. Nevertheless it is my view that where all the available factors at this stage appear to be evenly balanced it is a Counsel of prudence to take such measures as are calculated to preserve the status quo (see the *American Cyanamid* case [1975] 1 All ER 504 at p. 511). For the purpose of determining whether an interlocutory injunction should be granted, the status quo is the state of affairs existing during the period immediately prior to the application for interlocutory injunction (see *Garden Cottage Foods v. Milk Marketing Board* [1983] 2 All ER 770). The status quo need not be a fixed state of affairs. In appropriate circumstances, the Court may prefer to maintain a continuing state of affairs or the dynamic status quo (See *Films Rover International Ltd. & Ors. v. Cannon Film Sales Ltd.* [1986] 3 All ER 772 at p. 785).

In the instant case, I am of the considered view that the *status quo*, that is the state of affairs which had previously existed before the application of the *ex-parte* interim injunction was made on 10 November 1994 should be maintained and preserved. In this regard I find that the balance of convenience is in favour of the defendants and that the interlocutory injunction should not be allowed to continue until trial. In arriving at this decision I find that the first defendant in his claim of being a director and general manager of the plaintiff company had been actively involved in the management of the plaintiff company. At the same time, the first defendant and the second defendant are also the shareholders of the plaintiff company each owning one third each of the total shareholding of the company. The first defendant was responsible for obtaining the permit to extract the timber from the Forest Department and conducting all the dealings with the Department. Until the date of application for the *ex-parte* interim injunction made by the plaintiff, the first defendant had been responsible for the day to day management and operation of the company at the concessions site where the logging operation is carried out. It is a fact that the first and second defendant together with one Tan Sri Abu Zarim bin Omar, who has now aligned himself with the board of directors of the plaintiff instituting the present suit against the defendants were the three original Directors and shareholders of the plaintiff company when the three of them first took over the management and ownership of the company on 2 January 1992. The Form 49 and Form 24 respectively lodged with the Registrar or Companies on 2 January 1992 being the first Form 49 and the first Form 24 lodged for the plaintiff company, Ultratech Sdn. Bhd. showed evidence to that effect. I am of the view that if the interlocutory mandatory injunction is to be granted to the plaintiff the first and second defendant would be totally excluded from the management and operation of the plaintiff company which both the first and the second defendants in the first place had set up together with Tan Sri Abu Zarim bin Omar. To grant this mandatory injunction would also put a complete stop to the logging activities which had been carried on by the defendants in the name of the plaintiff company. Ultratech Sdn. Bhd. Until the present application by the plaintiff the defendants have *defacto* control and management of the operation of the logging activities of the plaintiff company. The workers at the concessions site are being paid by the defendants. It is my view that the

mere lodging of Form 49 dated 30 August 1994 by the plaintiff in the light of the presence of other Forms 49 lodged earlier and later with the Registrar of Companies is insufficient to dislodge the first, second and third defendants from claiming to be still the serving directors of the plaintiff company.

In refusing to allow the interlocutory injunction to continue until the trial of the action I wish to state that I do not find it necessary in the circumstances of this case to consider the contention of Counsel for the second defendant that if there had not been a full and frank disclosure of material facts by the plaintiff the Court should refuse the injunction. I also find it not necessary for me to invoke s. 54(j) of the Specific Relief Act 1950 (Act 137) as urged by the Counsel for the second defendant to refuse the injunction sought for when the conduct of the officers of the plaintiff have been such as to disentitle them to the assistance of Court. I am of the view that at this stage of the proceeding I should approach the *inter-partes* hearing more by considering the merits of continuing the injunction on the materials that had been disclosed by both parties. His Lordship Anuar J (as he then was) in the case of *Salcon Engineering Sdn. Bhd. v. PGM Energy Systems (M) Sdn. Bhd.* [1994] 1 CLJ 295 at p. 297h (left) on the question of whether the issue of non-disclosure is relevant or not had this to say:

> The practicality of the Bennet and Broadbent approach is that the Court will not, at the *inter-partes* hearing, be encumbered with a forensic study on the question of disclosure. In some cases, such as the present, this is an onerous task involving detailed study of voluminous documents. At the end of this exercise much time is wasted. I prefer to approach the *inter-partes* hearing on a more pragmatic level by considering the merits of continuing the injunction on the material disclosed by both parties.

In determining whether to allow the interlocutory injunction to continue until the trial of the action I am compelled to state that I also have to reconsider the nature of the injunction sought for by the plaintiff and ascertain whether in applying for the orders the plaintiff had complied with the basic pre-conditions for the making of an Anton Piller order. In this regard I find that the plaintiff had not precisely set out the terms of the injunction. The orders sought for are all couched in a general and loose manner as they did not specify precisely as possible the premises, the documents, materials and articles to be inspected and removed. As submitted by Counsel for the first and third defendants if the plaintiff seeks to obtain documents pertaining to the accounts they can easily be obtained from the accountant engaged by the defendants and if the plaintiff seeks to inspect and remove machineries at the concession site the plaintiff should refer to the contractors assigned to carry out the logging activities. As regards the records of sale of timber logs they can be obtained from office of the Forest Department. The plaintiff also seeks an order that the Registrar of Companies do forthwith remove and/or delete from the records of the plaintiff with the said Registrar the Forms 24 and 49 caused by the defendants to be lodged on or about the 10 October 1994 with the said Registrar in Penang and the Registrar do make such order of rectification as necessary to give effect to such deletion and removal. I find this order sought for by the plaintiff to be enforced by the Registrar of Companies rather misconceived in the circumstances of the case for if this order is granted it would tantamount to effectively disposing of the action as the defendants at this stage of the proceeding would have been totally excluded from asserting their right as being directors and shareholders of the plaintiff company. On this issue I have to restate that I have already made a finding earlier that as regards the many Forms 49 lodged by both parties the proper course of action for any aggrieved party to establish the true composition of the directorship of the company is by way of an application to the Court under s. 162 of the Companies Act 1965 to rectify the

register with Registrar of Companies. In this case therefore the plaintiff is not entitled to seek through this action an order directing the Registrar of Companies to enforce such an act as the plaintiff has not exhausted the statutory remedy available to them under s. 162 of the Companies Act 1965.

Having heard the submission of Counsel for the plaintiff and Counsels for the first, second and third defendants and having perused all the affidavits filed and having considered the principle applicable in interlocutory injunctions I find that the balance of convenience is in favour of the defendants. In the circumstances I dismiss with costs the application of the plaintiff and hereby set aside the order of the interim injunction granted on 11 November 1994 and order that damages suffered by the defendants if any be assessed.

Based on this judgment I also make an order dismissing the application of the plaintiff *ex-parte* summons-in-chambers filed on 2 December 1994 (Encl. 12) for leave to issue an order of Committal against the defendant for alleged failure to comply and obey the order of the interim injunction dated 11 November 1994.

Based on this judgment I further make an order dismissing the application of the plaintiff's summons-in-chambers filed on 7 December 1994 (Encl. 18) seeking an order to restrain the defendants from holding an Extraordinary General Meeting (EGM) of shareholders to give effect to certain resolution made in respect of the affairs of the plaintiff company, Ultratech Sdn. Bhd. This summons-in-chambers was filed by the plaintiff after the hearing of the *inter-partes* interlocutory injunction of this case had commenced.

In conclusion I wish to state that in arriving at the decision refusing the continuation of the interlocutory injunction until the trial of this action I have not allowed myself to be influenced by the state of the events that had taken place either through the action of the defendants or the plaintiff after the *inter-partes* proceeding had commenced on 24 November 1994.